Editor's note: Appealed -- sub nom. Murray Perkins v. Interior, Civ.No. CV-S-90-849-PHP (LRL); dismissed without prejudice and remanded to BLM, (D.Ct. Nevada, April 8, 1992), modified (June 10, 1992)

MURRAY PERKINS
INTERNATIONAL SILICA CORP.

IBLA 89-559, 90-213 Decided October 23, 1990

Appeal from a decision of the Las Vegas, Nevada, District Office, Bureau of Land Management, rejecting mining plan of operations to build roads to mining claims across wilderness and instant study areas, N54-89-10W. Appeal from a notice from the Stateline Resource Area, Nevada, Bureau of Land Management, to cease unauthorized activities resulting in impairment of instant study area and to reclaim surface disturbance, N54-89-10W.

Decisions affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations

   The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of their suitability for inclusion in the wilderness system. However, operations that impair wilderness suitability may be allowed if they are conducted in the same manner or degree as on Oct. 21, 1976, or if denial of exercise of valid existing rights will preclude the claimant's development of the claim.

2. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations

   BLM may properly reject a proposal in a mining plan of operations to construct a road within a wilderness study area if the record supports a conclusion that the road would impair the suitability of the area for preservation of wilderness. BLM's decision will be affirmed where BLM's judgment has not been shown to be in error.

3. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations

A claimant may proceed, pursuant to 43 CFR 3802.1-5(e), with activities proposed in a plan of operations before agency approval is obtained. Nonetheless, BLM may later properly determine that the action taken impairs wilderness suitability of affected lands and take action to modify or terminate the offending activity.

4. Rules of Practice: Appeals: Effect of

While the filing of an appeal suspends the authority of a deciding official to act in the instant matter, it does not affect his authority to act on matters that relate to management or preservation of public lands. Whether to permit road construction in a wilderness study area is an issue independent of the rejection of a plan of operations proposing such activity.

APPEARANCES: Murray Perkins, pro se; Charles Heisen, International Silica Corporation, Las Vegas, Nevada.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Murray Perkins, the claimant to the Lee and Lee #1 - #6 lode mining claims, N MC 125288 through N MC 125294, and International Silica Corpora-tion (International), the party responsible for construction of roads at issue in these appeals and holder of millsite claims to be used by Perkins, have appealed from a June 27, 1989, decision of the Las Vegas, Nevada, District Office, Bureau of Land Management (BLM), rejecting Perkins' mining plan of operations for his claims serial No. N54-89-10W. Perkins and International have also appealed from an October 17, 1989, notice from the Stateline Resource Area Office, Nevada, BLM, finding an "unautho-rized" road constructed by International pursuant to Perkins' rejected plan of operations had impaired the suitability of the area for wilder-ness preservation and that the surface disturbance must be reclaimed.

At issue here is the construction of roads leading to lode mining claims located in 1956 and situated just north of the Lake Mead National Recreation Area in sec. 15, T. 20 S., R. 65 E., Mt. Diablo Meridian, Clark County, Nevada. On February 28, 1989, Perkins filed with BLM a mining plan of operations for mining gypsum and borate ores from the claims. The plan calls for mining operations on the claims and for crushing, sizing, and loading operations on International's millsite claims situated in sec. 26, T. 20 S., R. 63 E., Mt. Diablo Meridian. Proposed access will be on existing roads except for:

1. A short section 2800', to be built in the SW1/4, Sec. 16, T20S, R65E to bypass Recreation Boundary * * *.

> 2. 4000' of road in the S1/2 of Sec. 8, T20S, R65E to join with HEISEN [of International] approved road * * *.
>
> 3. 3800' of road in SE1/4 Sec. 8 and NW1/4 Sec. 16, T20S, R64E, to bypass patented land in Sec. 17 * * * for rr shipments on ISC [International] siding.
>
> 4. 4500' of road in Sec. 26, T20S, R63E to cross and use for crushing sizing etc. on International Silica Corporation's millsite with permission of ISC.
>
> 5. We also intend to build the road Heisen has applied for (for joint use) from the mine to Lake Mead Blvd. through the ISC millsites.

(Perkins' Mining Plan of Operations at 1-2).

On March 14, 1989, BLM notified Perkins that the plan of operations, should include maps showing the area to be mined and the access roads, the acreage or dimensions of all surface areas to be disturbed for access, the location and nature of structures, and a statement that "reasonable measures will be taken to prevent unnecessary and undue degradation of Federal lands during operations." BLM stated further that "the regulatory 30-day proces-sing period pursuant to 43 CFR 3802.1-5 will not begin until all required information has been received by this office. Operations must not commence until either approval is received from BLM or until after the 30-day processing period." The requested information was presented to BLM in a supplement to the plan of operations dated April 11, 1989. The supplement, however, does not show when it was received by BLM.

BLM then conducted an environmental assessment of Perkins' plan. Although essential areas of environmental concern are discussed in writing by BLM's experts, their environmental assessments are not summarized in a single document to which we may refer. Among those assessment documents is the report of the Wilderness/Visual Resource Coordinator, Las Vegas District Office, BLM, dated June 23, 1989, which states:

> From the wilderness position there is no problem with development of the claims. However, several of the proposed roads are in conflict with the Interim Management Policy for the Muddy Mountain [Wilderness Study Area (WSA) 1/].

1/ A "wilderness study area" is defined as "a roadless area or island that has been inventoried and found to have wilderness characteristics as described in sec. 603 of [the Federal Land Policy and Management Act of 1976] and section 2(c) of the Wilderness Act of 1964 (78 Stat. 891)." Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72014, 72034 (Dec. 12, 1979).

> The segment immediately west of the Lee claim group con-necting Borax Wash and West End Wash (T.20S., R.65E., Sec 16) which cannot be approved as it crosses the WSA. There is existing access to the site that the claim holder will have to negotiate with the National Park Service. Access is not a grandfathered right. Reasonable access is available and denying the claim holder access across the WSA will not preclude him from developing his claims.
>
> The segment across public lands east of the Pabco mine (T.20S., R.64E., sections 8, 9, and 16) is in the Muddy Mountain WSA. Access already exists on the road to the southwest of the proposed route. The claim holder will have to negotiate access across the private lands. There is no grandfathered rights of access in this area. Reasonable access is available.
>
> The proposed road across the Heisen mill site claims (T.20S., R.63E., section 26) is within the Sunrise Mountain [Instant Study Area (ISA) 2/]. There is no existing road or trail across this area. This road violates the Interim Management Policy.
>
> The reclamation date for any authorized activity within a WSA in the State of Nevada was March 30, 1989. * * * None of the roads proposed could satisfy the nonimpairment criteria * * *.
>
> Recommendations and mitigation:
>
> 1. Deny all proposed roads within the Muddy Mountain WSA and Sunrise Mountain ISA.
>
> * * * * * * *
>
> 3. The claimant must negotiate access on existing roads to the claims with private land owners and the National Park Service.

Id. at 1, 2.

The Recreation Specialist and the Wilderness Coordinator of the Las Vegas District Office both comment that the proposed surface disturbance required to create new access routes will not meet the nonimpairment standard established for wilderness management. Relying on those reports, BLM rejected Perkins' plan of operations in the June 27, 1989, decision. Citing 43 CFR 3802.1-5(b)(3), the decision rejected the plan because "the anticipated impacts of your proposed operation are such that a portion of

2/ An "instant study area" is "one of the 55 primitive and natural areas formally identified by BLM through a final actions published in the Federal Register before Oct. 21, 1975. FLPMA requires an accelerated wilderness review of these areas." IMP, 44 FR at 72033.

the planned operations will impair the suitability of the WSA for preservation as wilderness." In their statement of reasons filed August 14, 1989, appellants state that two of the three roads at issue were completed prior to BLM's decision, a project, they argue, BLM knew about but did not oppose.

Meanwhile, following an inspection of the general area of the claims conducted by BLM on June 30, 1989, a report recommended reclamation of the surface disturbance caused by a road in sec. 26, T. 20 S., R. 63 E., Mt. Diablo Meridian, built by International across International's millsite claims and one of the new roads proposed in the subject plan of operations. Thereafter, on October 17, 1989, BLM sent notice to International that, in light of the rejection of Perkins' plan of operations, the road built on the millsites was an unauthorized impairment of an ISA. International was told to cease operations in the ISA and reclaim surface disturbance.

Appellants argue that BLM's reasons for rejecting the plan of operations are incorrect. With respect to the June 27 decision, they express confusion over whether the plan rejection included all three roads traver-sing "wilderness review" lands or just the segment of road which was not yet constructed. Appellants argue that the proposed mining plan, including proposed roads, was proper as an exercise of valid existing rights and not subject to the impairment standard, but qualified for management under a lesser "unnecessary or undue degradation" criterion. They also assert that, in recognition of their valid existing rights, BLM should have allowed discussion of mitigating measures. Appellants argue that BLM failed to consider a miner's right to access to his mining claim, which right, they contend, was not amended by laws establishing wilderness management stan-dards. They also object to BLM's judgment concerning alternative routes, asserting they are much more dangerous and will cause more damage to the environment than the proposed route.

Concerning the reclamation of the constructed road required by BLM's October 17, 1989, decision, appellants aver that BLM's March 14, 1989, letter required only a 30-day delay before construction could begin and that thereafter, absent disapproval, the activity was authorized. They further assert that, even if this road were part of the plan rejected by BLM in the June 27 decision, BLM's directive to reclaim is stayed by the appeal filed from the former decision. 3/

[1] The standard for managing public lands during wilderness review is established by section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1988). BLM is required under the

3/ In addition, International advances the argument that BLM has verbally admitted that it has suspended International's patent application for these claims. International states that a "final certificate" was issued on June 7, 1989, conferring upon it the right to enter and occupy these lands. However, International does not appeal from a decision denying its rights to use these lands in conjunction with its millsite claims. Rather, the decisions on appeal concern Perkins' plan to use these lands with respect to operations for his distant mining claims.

statute to manage land under wilderness study so as to not impair the suit-ability of the area for preservation as wilderness (the nonimpairment stan-dard). See also 43 CFR 3802.0-6; Ralph E. Pray, 105 IBLA 44 (1988). The implementing regulations at 43 CFR Subpart 3802 and the IMP, 44 FR 72014 (Dec. 12, 1979), modified, 48 FR 31854 (July 12, 1983) (also published as Dept. of the Interior Doc. H-8550-1), call for surface management controls over mineral activities on lands under wilderness review to ensure the statutory nonimpairment standard is met. In general, the Secretary may not allow impacts that cannot be reclaimed to the point of being substan-tially unnoticeable in the area as a whole by the time scheduled for a recommendation to the President on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System. Nor may actions be allowed that will have degraded wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation regarding the area's suitability for preservation as wilderness. 43 CFR 3802.0-5(d); 44 FR at 72016.

There is, however, a statutory exception to this standard for mining and grazing use already existing on October 21, 1976. Section 603(c) provides that such mining and grazing may continue

> in the manner and degree in which the same was being conducted on October 21, 1976: Provided, that in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

43 U.S.C. § 1782(c) (1988). Further, section 701(h) of FLPMA, part of the savings provisions of the Act, provides that actions of the Secretary under FLPMA shall be subject to "valid existing rights," a term which the Board found in John Loskot, 71 IBLA 165, 167 (1983), to encompass claims with a valid discovery existing prior to the enactment of FLPMA. Thus, construction of temporary or permanent access routes to mining claims not satisfying the nonimpairment criteria may be approved if the use was "grand-fathered" or if BLM should determine that application of the nonimpairment standard would unreasonably interfere with the development of the claim. IMP, at 38-39. Such activities shall be regulated only to prevent undue and unnecessary degradation of public lands.

[2] Appellants seek application of this lesser management standard because the subject mining claims were located prior to 1976. However, the lesser standard is not available without actual prior use of affected lands. 4/ There were no operations on these claims in 1976, and certainly no roads existed across the wilderness review lands proposed to be built

4/ It is the use, rather than the claim, that is grandfathered. 48 FR at 31854.

by Perkins. 5/ Section 603(c) of FLPMA allows the continuation of ongoing operations on pre-FLPMA claims, but only to the manner and degree they were conducted on October 21, 1976. The term "manner and degree" means "actual on-the-ground activity taking place on October 21, 1976." See Rocky Moun-tain Oil & Gas Assn. v. Watt, 696 F.2d 734, 749 (10th Cir. 1982). The pur-pose of this management scheme is to maintain the status quo existing on October 21, 1976, so that lands then suitable for wilderness consideration will not become unfit for such consideration before the Secretary makes his recommendation. Id. We conclude that the proposed operations are not among those uses considered to be "grandfathered" by FLPMA.

Under section 701(h) of FLPMA, all mining claimants who located claims on or before October 21, 1976, and are able to demonstrate a discovery as of that date, as required under the 1872 Mining Law, will be allowed to continue their mining operations to full development. The right of access to a mining claim is a valid existing right. See 48 FR 31854 (July 12, 1963); Mespelt & Almasy Mining Co., 99 IBLA 25, 27 (1987). However, con-trary to appellant's contentions, FLPMA amended the 1872 Mining Law with respect to access by making the right of access subject to Federal regula-tion when access crosses Federal property. See State of Utah v. Andrus, 486 F. Supp. 995, 1007 (D. Utah 1979). BLM is authorized to regulate the method and route of access over Federal lands so as to prevent permanent impairment of wilderness characteristics. Id. at 1009; Eugene Miller, 103 IBLA 308 (1988). Such regulation cannot, however, prohibit access or be so restrictive as to preclude economic development. State of Utah v. Andrus, supra at 1011. If, therefore, it is determined that access rights for a valid mining claim existing on October 21, 1976, can be exercised only through activities that will impair wilderness suitability, the activities will be regulated to prevent unnecessary or undue degradation. 48 FR at 31858.

On the record as it now stands, the matter of access to the claims is not clear. BLM finds that there are existing roads to the subject claims that do not intrude into the wilderness study areas in question. Appel-lants question whether parts of those roadways are available for mining uses described in the plan of operations. BLM's determination focuses on three new roads proposed by Perkins. The first 2,800 feet of road in sec. 16 of

---

5/ Perkins summarizes the history of access to the subject mining claims in his plan of operations:

"In April of 1956, the Lee claims were located on a 60' thick bed of 97% gypsum, 1 mile in length, in Sec. 15, T20S, R65E, however the only road out of the area to Las Vegas Blvd was taken in 1952 by Nellis Base. From 1952 on there was no access available to these claims except across Pabco or Fiberboard patented ground. The entrance road from the new Lake Mead Blvd. to Pabco was built by the county, but ended in Pabco private ground at a private tramway issued by the B.L.M. in 1958.

"As of October, 1976, the claims became further isolated, even though they had a valid discovery, there was no access available.

"Now with reasonable access available to Lake Mead Blvd. and millsites to use, this deposit can operate very successfully."

T. 20 S., R. 65 E., Mt. Diablo Meridian, is meant to bypass a section of road that crosses Lake Mead Recreation Area, managed by the National Park
Service (NPS). The road (which has been completed, according to appel-lants) is close to the boundary of the Recreation Area. The second road, 3,800 feet long in T. 20 S., R. 64 E., is meant to bypass a section of county road running through patented land in sec. 17. Appellants have brought attention to an ambiguity in the map of the WSA in this area. While the boundary of the Muddy Mountain WSA is shown to extend into the NE¼ of sec. 17 to the edge of the county road, all of sec. 17 has been patented and, therefore, is not public land. Perkins' proposed road across the WSA in secs. 8 and 16 passes very close to the edge of the patented lands.

In both instances, BLM says Perkins can use existing roads, concluding that the activities proposed by Perkins' plan of operations would impair the wilderness suitability of the WSA. The record supports this aspect of BLM's determination. Nonetheless, Perkins must have access to his claims and, in this respect, the record is unclear. The access sanctioned by BLM appears reasonable, in that BLM seeks to have appellants use the existing county roads. It is not certain those roads can be used as proposed in the plan of operations. Nevertheless, there is nothing to indicate that appel-lants will not be able to use the county road, even where it crosses NPS and private lands, for access to the claims for other actions proposed in the plan of operations. Appellants have not shown error in BLM's determination that, because an existing road is available, access to the claims is not denied by disallowing construction of these first two roads. Nor have appellants shown how the deletion of these two roads from the plan will affect Perkins' right of access to his mining claims.

The third road at issue, 4,500 feet long in sec. 26, T. 20 S., R. 63 E., Mt. Diablo Meridian, is intended to cross International's mill-site claims to provide access for crushing and sizing operations. BLM concludes that this road would impair the Sunrise Mountain ISA. The record shows that this section of road is not essential to give access to Perkins' mining claims. Appellants attempt to avoid this objection, arguing that the road can be properly developed by International to provide access to additional claims in the area. However, International's right to build a road through the area is not now under review. The question before BLM, in reviewing Perkins' plan of operations, is whether appellants have demonstrated that a road impairing the wilderness suitability of the subject lands is allow-able to provide access to Perkins' mining claims. As the need to use this section of road to provide access to Perkins' mining claims has not been shown, we conclude that this road is not subject to the lesser management standard applied to cases where a valid existing right has been shown to exist.

The question now before us is whether BLM's decision rejecting Perkins' plan of operations because it violated the nonimpairment standard was reasonable and is supported by the record. See, e.g., Manville Sales Corp., 102 IBLA 385, 390 (1988). The issue is whether BLM properly rejected Perkins' plan of operations because the roads to be built will impair the wilderness suitability of the study area. BLM found that any

activity in the area would impair wilderness suitability because the time allowed for reclamation has passed. Appellants have not shown error in this conclusion. They contend that they have a valid existing right to construct three roads, a condition which, for the reasons discussed above, we conclude has not been shown to exist. Because appellants have not offered evidence that BLM's conclusions are incorrect, we affirm BLM's June 27, 1989, decision rejecting Perkins' plan of operations.

[3] Appellants admit that they have proceeded with construction of two of the roads mentioned in Perkin's plan of operations. It is the third road discussed above, the road across International's millsite claims, that is the focus of the second appeal here. As stated above, approval of construction of any of the roads described by Perkins in his plan of opera-tions, N 54-89-10W, must meet the nonimpairment standard. BLM applied this standard in the October 17, 1989, notice. Appellants contend that, regard-less which standard is applied, they were allowed to proceed with the plan pursuant to BLM's March 17, 1989, instructions. They assert that the proper course of action, now that the roadwork has been completed, is not rejection of the plan, but a request by BLM for measures to mitigate the plan's impact using the undue and unnecessary degradation standard. 6/

Departmental regulation 43 CFR 3802.1-5(a) compels BLM to "promptly acknowledge the receipt of a plan of operations and within 30 days of receipt of the plan act on the plan of operations to determine its accept-ability." Should BLM fail to notify the operator of any action on the plan or extend the period of consideration an additional 60 days in accordance with 43 CFR 3802.1-5(d)(3),

> operations under the plan may begin. The option to begin opera-tions under this section does not constitute approval of a plan of operations. However, if the authorized officer at a later date finds that operations under the plan are impairing wilderness suitability, the authorized officer shall notify the operator that the operations are not in compliance with these regulations and

---

6/ The Department did not intend that a decision on an access route be reached without dialogue between BLM and the claimants; the preamble to the regulations at 43 CFR Part 3800 explains:

"The authorized officer will select the access route in consultation with the operator, after discussion of the operator's needs and his ability to meet the requirements imposed by the authorized officer. There is no intention to place conditions on a route of access that make it impossible for the operator to carry out operations that are approved under a plan of operations.

"However, the final decision as to the means of access will be with the authorized officer who has the responsibility of protecting the public lands and their resources."
45 FR 13968, 13973 (Mar. 3, 1980).

> what changes are needed, and shall require the operator to submit a modified plan of operations, within a time specified in the notice.

43 CFR 3802.1-5(e). BLM stated in the March 14 notice that, because the plan of operations was incomplete, the 30-day processing period "will not begin until all required information has been received by this office."

The record does not establish when Perkins' supplement to the plan of operations was received by BLM. The supplement is dated April 11, 1989, and the earliest of the environmental review documents to consider it is dated May 17, 1989. BLM did not extend the review period under 43 CFR 3802.1-5(d)(3). Thus, a short, undetermined "window" of opportunity for appellants to commence with the plan of operations existed prior to BLM's June 27 decision. Nonetheless, the authority allowing appellants to pro-ceed, 43 CFR 3802.1-5(e), does not ratify their actions. In the preamble to the promulgation of these regulations, operators were cautioned that they assumed certain risks: "Those operators who have submitted a plan and after 30 days has elapsed, wish to take the risk and begin operations can proceed with the real possibility that their operations will be terminated if they are found to be impairing wilderness characteristics of the area." 45 FR at 13972.

BLM found the unapproved road in question impaired the wilderness suitability of the ISA and directed appellants to reclaim the road. Appel-lants have offered no justification for allowing this road to exist where it impairs the wilderness suitability of the ISA. The stated purpose for this road is for the development of Perkins' claims. As the route does not provide essential access to the claims, BLM properly disallowed it and ordered it reclaimed.

[4] Appellants' contention that BLM was prevented from ordering them to stop construction and reclaim the road because the same road is the subject of their earlier appeal misconstrues the effect of filing an appeal. While the effect of 43 CFR 4.21(a) is to suspend the authority of the deciding official to exercise jurisdiction directly relating to the subject of the appeal, it does not have the effect of suspending BLM's authority to act on matters that are functionally independent from the subject of the appeal. Robert B. Bunn, 102 IBLA 292 (1988). The road in question was unauthorized when it was constructed. The situation might have been different if failure to issue a decision on the plan of opera-tions within 30 days operated to authorize the proposed operations. How-ever, appellants proceeded under the risk that their unauthorized operations might be terminated. The question of the correctness of BLM's rejection of Perkins' plan of operations is independent from the question of the propriety of action taken by BLM to implement a congressional mandate to preserve the wilderness integrity of lands under review. The purpose of 43 CFR 4.21(a) is to maintain the status quo and preserve the rights of the parties. The continuing need to protect public land from improper use is separate from the appeal of the operating plan. We conclude that BLM had jurisdiction under its management authority to address appellants' unauthorized impairment of the Sunrise Mountain ISA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness
Administrative Judge

IBLA 89-559, 90-213

ADMINISTRATIVE JUDGE MULLEN CONCURRING IN THE RESULT:

If the majority opinion focused only on the determinative issue in this case, I could join rather than concurring in the result. It did not.

If a tract of land is selected as a candidate for inclusion in a wilderness area, the Secretary is charged with the responsibility for maintaining the lands in a manner that will not impair the suitability of the lands for preservation as wilderness until Congress determines whether it will be made a part of the wilderness system or released for multiple use management. Thus, until Congress acts, the Department is unable to approve any action which may impair its suitability. It takes no stretch of the imagination to conclude that a road would impair the suitability for preservation as a wilderness area.

The exception to the prohibition imposed upon the Secretary by Congress is found at 43 U.S.C. § 1782(c) (1988), and provides that mining operations existing on October 21, 1976, may be continued in the same man-ner and degree in which they were being operated on that date. The latitude afforded the Department in the case of continuing operations is restricted by the requirement that the Secretary regulate the activity to assure that unnecessary or undue degradation will be avoided.

The determinative factor in this case is the fact that the operators have advanced no evidence of any operations on the claims on or before October 21, 1976. An operator who claims that his operations can continue because he falls within the exception to the rule must demonstrate that the exception applies because there was an existing mining operation on October 21, 1976. Lacking any information that mining activities were being conducted at that time, I am left to conclude that the operation did not exist on October 21, 1976, or, if it did, the operations called for exceeded the manner and degree they were being operated on that date. One need go no further to resolve this case.

The majority does not stop here however, but indicates that the pro-posed operation does not meet the unnecessary or undue criteria. I am unwilling to lend my signature to that conclusion. By no stroke of the wildest imagination am I able to conclude that road construction across Federal lands being held for wilderness study will result in unnecessary or undue degradation because the operator might be able to obtain a rightof-way across lands administered by the National Park Service. This line of thinking leads only to nightmarish results.

Once the operation has qualified as an exception to the rule, the burden of proof shifts. When the Bureau of Land Mangement (BLM) is charged with the responsibility of regulating an operation which was existing on October 21, 1976, and which is being con-tinued in the same manner and degree in which it was being operated on that date, BLM must show that the proposed activity will result in unnecessary or undue degradation. That is, there is some other course of action that can be taken to avoid that degradation. Congress provided for the continuance of existing operations. In doing so, it recognized that the operation could totally destroy the area's

suitability for inclusion in a wilderness area. BLM can restrict such an operation only by showing that the activity is unnecessary, or that that operation is being conducted in an unminerlike manner (see, generally, 43 CFR 3802.0-5(1)).

It is not enough to show that this degradation might be avoided if the operator could take some other course of action. It must be shown that the alternative course of action is available to the operator, that it does not restrict the degree and manner of operation beyond that which was being conducted on October 21, 1976, and more importantly, the other course of action will result in a reduction in the degradation of the affected lands. The rationale advanced by BLM in this case is fraught full of proposed action the operator might be able to take. There is no evidence, however, that the course of action is available. Using the same rational, BLM could deny all operating permit applications because the operator might be able to get a private bill through Congress removing the area from wilderness study. The possibility is just as great as getting a right-of-way from the National Park Service for a road to be used by mining trucks.

R. W. Mullen
Administrative Judge